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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

WARREN BRUCE FITHIAN,

Defendant and Appellant.

F058089

(Super. Ct. No. 7544)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Mariposa County. David Minier, Judge. (Retired Judge of the Madera Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

* Before Vartabedian, Acting P.J., Cornell, J. and Hill, J.

Defendant Warren Bruce Fithian was convicted following a jury trial of evading a peace officer with willful disregard for the safety of persons or property and assault with a deadly weapon upon a peace officer.¹ He appeals, claiming the trial court erred in denying his new trial motion based on jury misconduct. We affirm.

Factual and Procedural Background

On November 27, 2008, Merced Police Officer John Pinnegar was on duty when he saw defendant's truck slow but not stop for a stop sign. Pinnegar began following defendant's truck and activated his overhead lights and siren. Defendant did not stop and evaded Pinnegar at speeds up to 95 miles per hour.

Other officers joined in the pursuit of defendant. Officer Daniel C. Baker, an 18-year veteran of the California Highway Patrol (CHP), placed his patrol car across the northbound lane of the road. He stepped outside of his patrol car armed with a shotgun. As he stood at the rear of his patrol car, defendant's truck approached. The truck slowed and then accelerated. Baker moved and defendant steered his truck in the direction of Baker and accelerated. Baker moved to get away and fired his shotgun at the truck as defendant passed by him. It was Baker's belief that if he had not moved the truck would have hit him.

An investigation of the incident was conducted by the CHP because a gun was fired by a CHP officer.

During jury voir dire, the court briefly explained to the jurors the nature of the charges and asked the jurors as a group if there was any reason they could not be fair and impartial. There was no response.

¹ Defendant entered a plea of no contest to driving while his privilege to drive was suspended because of a prior driving under the influence conviction and to driving with a suspended license. In addition, he admitted he served a prior prison term. Assault with a deadly weapon on a peace officer is a serious felony pursuant to Penal Code section 1192.7, subdivision (c).

The court questioned the jurors regarding their connections to law enforcement. Juror No. 85866 (the foreperson) stated that both of the foreperson's parents were retired CHP officers. In addition, the foreperson stated that after the foreperson's father retired he worked as an investigator for the public defender's office, "[s]o now I have both sides." The foreperson stated, "I'm very open to what the evidence is."

Defendant was found guilty of evading a peace officer with willful disregard for the safety of persons or property and assault upon a peace officer. Defendant filed a motion for new trial claiming the foreperson committed misconduct by failing to disclose a bias in favor of law enforcement and in telling the jurors they could be convicted of perjury if they did not find defendant guilty.

The motion for new trial included two declarations from jurors. The declaration from juror one² declared that the foreperson stated that each juror would be committing perjury if he or she did not find defendant guilty. Juror one also declared that one juror commented about the investigation that had been done by the CHP. In response to this comment, the foreperson accused that juror of challenging the credibility of an 18-year veteran of the CHP.

Juror two declared there was a division among the jurors, and the foreperson stated that based upon the written jury instructions each of them would be committing perjury if defendant was not found guilty of the assault on a peace officer. In addition, juror two said that the foreperson stated something to the effect that the CHP officer should be

² Rather than inserting the juror identifying number in the clerk's transcript in place of jurors' names, the clerk of the court either blacked out or whited out the names of the jurors and did not insert a juror identifying number. California Rules of Court, rule 8.332 provides that the names of trial jurors "must be replaced with an identifying number wherever it appears in any document." Because the record here involves only three jurors, we are able to decipher which juror is being referred to in the documents and the transcript. In the future the clerk and court reporter should comply with the clear dictates of the Rules of Court and substitute a juror identifying number in the place of any name of a trial juror.

trusted because he is a police officer and his word should carry more weight merely because he is a sworn officer.

The People opposed the motion for new trial and filed a declaration from the foreperson in response. The foreperson declared that “[a]t one point during the deliberations, I stated that all of us had taken an oath to set aside our own feelings and to apply the law. I further said it would be like committing perjury if we didn’t follow the jury instructions we were given. I never said anyone could be charged with perjury.” In addition, the foreperson stated that only one comment was made about the CHP officer. That comment was that he had 18 years of experience. “I have no bias, one way or the other about police officers being more truthful than other persons. I made that clear when asked during voir dire.”

The court found no jury misconduct. As to the comments regarding the credibility of the CHP officer, the court found that when the statements of all three jurors were taken together it was a typical argument over the credibility of a particular witness and the jurors should appropriately consider the background, training and experience of any witness. The court found nothing erroneous about the foreperson commenting on the experience of the CHP officer.

It was also the court’s conclusion that the foreperson’s statement about the CHP officer’s experience did not show a concealed bias. The court noted the foreperson freely commented on the background of the foreperson’s parents and said she could be fair.

With regard to the statement made by the foreperson about perjury, the court found that, taking all three of the statements together, it was the court’s interpretation that the foreperson was telling the jurors that “if you don’t follow the law the judge has given you, it’s as if you have lied when you were being questioned under oath and you said that you would follow the law.”

The court found that it would not make any sense for someone to say if you don’t find the defendant guilty you will be charged with perjury and no reasonable juror would

believe such a statement. The court found no misconduct and the motion for new trial was denied.

The court imposed the aggravated five-year term for the assault on a peace officer and imposed a consecutive eight-month sentence for evading a peace officer. In addition, the court imposed a consecutive one-year sentence for the prior prison term enhancement.

Discussion

Defendant contends the foreperson engaged in prejudicial misconduct both during jury selection by concealing bias towards law enforcement and during deliberations by “contaminating” the rest of the panel with inaccurate legal advice (threatening perjury) and using the foreperson’s law enforcement background to unduly influence and prejudice other members of the jury. It is defendant’s claim that the misconduct was prejudicial and the trial court erred in denying the motion for new trial.

“The trial court is vested with broad discretion to act upon a motion for new trial. [Citation.] When the motion is based upon juror misconduct, the reviewing court should accept the trial court’s factual findings and credibility determinations if they are supported by substantial evidence, but must exercise its independent judgment to determine whether any misconduct was prejudicial.” (*People v. Dykes* (2009) 46 Cal.4th 731, 809.)

The trial court considered all three declarations as a whole and concluded the discussion regarding the CHP officer was a normal discussion regarding witness credibility based on training and experience and no misconduct occurred. The trial court considered all three declarations when it determined the foreperson mentioned perjury only in the context of telling the jurors they swore they would follow the instructions and to not do so would be akin to perjury. In addition, the court found that there was no concealment of bias; the foreperson was straightforward during voir dire regarding her familial associations with the CHP, and there was nothing in the declarations as a whole that showed a concealment of bias. Defendant’s argument on appeal is based solely on

his piecemeal interpretation of the declarations. We are bound by the trial court's factual findings and credibility determinations.³ The trial court's conclusions are reasonable and supported by the evidence. We find no error.

Disposition

The judgment is affirmed.

³ Defendant did not request an evidentiary hearing and such a hearing is generally unnecessary unless there is a material conflict that can only be resolved at such a hearing. (*People v. Dykes, supra*, 46 Cal.4th at p. 810.)